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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DEVANTE JEFFERSON,<br><br>Defendant and Appellant. | B298517<br><br>(Los Angeles County Super. Ct. No. BA458252) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael D. Abzug, Judge. Affirmed.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Stephanie C. Brenan, Supervising Deputy Attorney General, and Nathan Guttman, Deputy Attorney General, for Plaintiff and Respondent.

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## *INTRODUCTION*

A jury convicted Devante Jefferson of one count of human trafficking of a minor for commercial sex and of one count of pimping another female and was sentenced to prison for 18 years, 8 months. We affirm. The court did not abuse its discretion in denying a request to recall the minor witness, in excluding irrelevant Instagram screenshots, in allowing introduction of a prior pandering conviction, or in denying a motion to strike a prior burglary conviction. There was also no *Brady* violation (*Brady v. Maryland* (1963) 373 U.S. 83), and no showing of ineffective assistance of trial counsel. As the trial court said in denying the new trial motion, the minor was "credible and convincing"; it did not help that the defendant absconded before closing argument and left defense counsel arguing on behalf of an empty chair.

## *FACTUAL AND PROCEDURAL HISTORY*

Fifteen-year-old B.L. was reported a runaway by her mother.[1] Using social media, detective Gordon Lukehart of the Los Angeles Sheriff's Department human trafficking bureau linked the minor to the defendant and a suspected prostitute named Aarin. The police located them at a Rodeway Inn and Suites in Inglewood. Answering a Craigslist website advertisement, an undercover officer made a "date" with Aarin. At the appointed time, officers went to the motel and detained the minor, Aarin, and several others. They also detained

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[1] The victim was a minor and subject to juvenile court proceedings; therefore, we only use her initials.

Jefferson and a Dominique Brown a short distance away at a liquor store.

In the information, Jefferson was charged in count 1 with human trafficking of a minor, B.L., for a commercial sex act between December 1, 2016, and February 1, 2017. (Pen. Code, § 236.1, subd. (c)(1).) In count 2 he was charged with pimping Aarin A., a prostitute, during this same time period.[2] (Pen. Code, § 266h, subd. (a).) It was also alleged he had suffered a prior conviction in 2012 for first degree burglary (Pen. Code, § 667, subd. (d)) and had suffered a prior conviction and served a three-year prison term in 2014 for attempted pandering by procuring (Pen. Code, § 667.5, subd. (b)).

The minor was a recalcitrant witness. To avoid testifying at all, she first ran away from home. When the police finally found her at a house in Tarzana, she was detained as a material witness. Then, and even after having been given use immunity (because of pending juvenile court proceedings, including a charge of vehicle theft), she tried to invoke the Fifth Amendment.

She eventually testified at trial. She told the jury she had engaged in sex for money and it was Jefferson's idea. They met on Instagram in December 2016 and he convinced her to work for him as a prostitute and give him the proceeds. She worked alongside Aarin, who was already working for him. All of her clients came from Internet advertising Jefferson prepared. When a date was finished, she would text him and give him the money. She admitted she had given Aarin the money a couple of times

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[2] Although her last name was known—it was on a room registration receipt—Aarin's full name was not used at trial even though she was an adult. She did not testify because the police could not find her.

but believed it went to Jefferson. Her court testimony about what had happened was the same thing she told Detective Lukehart before trial. When asked, she told the jury she did not want to be there or testify, calling it "irritating." She was testifying only because "the judge said that he could hold me in jail until I said something," and even though she was afraid for her safety and the safety of her family.

After recross-examination concluded, the defense agreed that the minor could be excused, "[s]ubject to recall on the defensive [*sic*] last recross," five questions about whether the minor had texted with Aarin or another woman on January 9, the day she was detained. She had said no as to Aarin, but did not "recall" as to the other woman. The court turned to the minor, who was still under the court's detention order, and told her: "In the unlikely event there is a question that they couldn't have asked you today, if I find that they couldn't have asked it of you today, I am going to—I am going to recall you. [¶] So you're still under the jurisdiction of the court at least for the next few days until the court proceeding is over, but you can go about your business now."

The following day, defense counsel asked to recall the minor because he had reviewed everything and now had the text messages exchanged between the minor and Aarin that day. It was the defendant's position that "Aarin was [the minor's] pimp."[3] After a lengthy colloquy, the court denied the request. It

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[3] This was a new theory. The initial defense was that Dominique Brown, who had been detained with Jefferson, was the pimp. Indeed, in his opening statement, defense counsel told the jury Brown was "someone who has clearly held himself out to be a pimp."

stated: "You know, here is a young girl that is involuntarily in custody having done nothing wrong. And you saw what she went through to give testimony in this case. I don't want to be unfair to you, but I told you at the time I agreed to keep her under the Court jurisdiction that I would keep her under court jurisdiction if I was satisfied that there were no questions you could have asked her that you didn't. In other words, if something came up that you couldn't prepare for, to state it another way more clearly. [¶] It seems to me if you've had those text messages for as long as you did, and that I think it's reasonable to assume that you were on notice to prepare that she may have given testimony that was inconsistent with the text messages and equipped yourself accordingly."

Detective Lukehart was called as an expert on human trafficking and pimping. He explained the basic terms (such as the track, stable, renegade, bottom bitch, etc.) and how the process works (from luring in young girls, advertising, and how to maintain control). He further testified that the pimp and the prostitutes will hang out together in the same room until the customer is to appear. The pimp will then go outside to a car, or drive a short distance away, to wait. He further told the jury that when he tried to interview the minor she was initially uncooperative; however, she eventually she told him what had happened. He described the minor at that time of the interview as "[v]ery withdrawn, sad. She was crying."

The prosecution also called Angela Luna, an officer with the Los Angeles Police Department. In 2013, she was posing as a prostitute in an undercover sting operation when Jefferson approached her. In later texts and telephone calls he tried to convince her to work for him as her pimp. It was stipulated that

on January 23, 2014, Jefferson was convicted of attempted pandering based on the contact with the officer.

Jefferson absconded after the prosecution completed presentation of its case. The court issued a bench warrant for his arrest. In closing argument, defense counsel acknowledged that his client was gone but tried to persuade the jury that "Aarin was [B.L.'s] pimp." The jury returned a verdict in 15 minutes, finding Jefferson guilty on both counts and the special allegations true.

Jefferson filed a new trial motion where he argued, among other things, that there had been a *Brady* violation. It seems that in 2018, a year before trial, the minor was stopped by Long Beach police. She twice gave them a false name to avoid being arrested on outstanding warrants. The police report of this encounter was first turned over to the defense after the jury had rendered its verdict. The new trial motion was denied on all grounds. Jefferson was later apprehended and sentenced to prison.

## *DISCUSSION*

### I

### There Was No Abuse of Discretion in Refusing to Recall the Minor Witness

The primary, and only percipient, witness against Jefferson was the minor. He argues it was an abuse of discretion to deny his request to recall her for further cross-examination on certain text messages that could have impeached her.

It is not entirely clear from the record if this issue falls more under Evidence Code section 774 or section 778, but it is not

necessary to resolve that.[4] In either case, the court's denial of the request to recall the minor is reviewed under the abuse of discretion standard. (*People v. Tafoya* (2007) 42 Cal.4th 147, 175–176.) Abuse of discretion is a deferential standard (*People v. Fuiava* (2012) 53 Cal.4th 622, 711), and the trial court's determination will be upheld unless it falls outside the bounds of reason. (*People v. Osband* (1996) 13 Cal.4th 622, 666.) We find no abuse of discretion here.

The record reflects that Jefferson had a fair opportunity to cross-examine the minor on any relevant subject, including the text messages. There were no limitations. When the minor was asked if she had exchanged text messages with Aarin and the other woman, defense counsel had the text messages in his possession; they had been given to him some six weeks or so earlier when he assumed the defense. His excuse for not using them during cross-examination was that a significant number of documents had been turned over and he had not been able to coordinate them all.

The court reviewed the text messages. It noted "the identity of the people that are being texted is not clear from the exhibit itself," to which defense counsel conceded there were some "foundational problems." The court further pointed out the

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[4] Section 774 provides: "A witness once examined cannot be reexamined as to the same matter without leave of the court, but he may be reexamined as to any new matter upon which he has been examined by another party to the action. Leave may be granted or withheld in the court's discretion." Section 778 provides: "After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."

messages were facially "innocent" and, to the extent the minor may have lied the day before, her lie was not about anything material. The defense argued the text messages went to third party culpability because it showed Aarin was telling the minor what to do. But as the court emphasized, the defense had time during cross-examination to ask the minor whether Aarin was her pimp and did not.

The court also expressed concern about the emotional and mental well-being of the minor if she were recalled. She had been subjected to human trafficking, did not want to be in court, and was "irritated" about the examination. As the court commented, "you saw what she went through to give testimony in this case." When the transcript is contextualized, we find the court's determination was within the bounds of reason.

Jefferson's reliance on *People v. Riley* (2010) 185 Cal.App.4th 754 and *People v. Raven* (1955) 44 Cal.2d 523 is misplaced. In *Riley*, the question was whether the prosecution could re-open its case after a Penal Code section 1118.1 motion had been made in order to present evidence inadvertently omitted that went to an element of the crime. (*Riley*, at pp. 765–767.) In *Raven*, the judgment was reversed because the trial court failed to exercise discretion it thought it did not have. (*Raven*, at pp. 526–527.) Neither case is in point, and neither case sows any seeds of doubt as to the trial court's exercise of discretion here.

## II

## The Instagram Screenshots Were Properly Excluded as Inadmissible Writings

Jefferson argues the trial court abused its discretion in refusing to admit exhibits C and D, screenshots from the minor's Instagram account, on the ground they were not properly authenticated. He had provided them to counsel and could vouch for their authenticity.[5] "We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion. [Citation.] Specifically, we will not disturb a trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*); Evid. Code, § 353.)

On cross-examination, the minor was asked whether she sent an Instagram message to Jefferson stating, " 'I can really make your life a living hell.' " She did not "recall" sending him any messages, including that one. She was then asked whether she ever sent a message to Jefferson stating, " 'I testified on you because you got my name looking bad AF.' " She again said she "[did not] recall" sending such a message. Counsel showed her a copy of the screenshots, marked for identification only, but they did not refresh her recollection. The minor admitted the Instagram account name was hers but said others (and she gave

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[5] The court reminded Jefferson of his right to remain silent. No formal effort was made to authenticate the screenshots through the defendant.

a best friend's name), also had access to the account because she often failed to log off.

When Jefferson sought to introduce the screenshots into evidence as exhibits C and D, the prosecution objected on foundational grounds. Although the court had concerns about whether a proper foundation had been laid, admission of the screenshots was not denied on lack of authentication. Rather, their admission was denied on grounds they were irrelevant, inadmissible hearsay, more prejudicial than probative, and violated the rule of completeness.

The Attorney General effectively concedes the Instagram screenshots were properly authenticated. Printouts of content posted on social media must be authenticated before they may be admitted into evidence. (Evid. Code, § 1401; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1434–1435.) Authentication may come in many forms, including inferences that can be drawn from the contents of the writing. (Evid. Code, § 1421.) There only has to be a prima facie showing that the writing is what it purports to be. (*Goldsmith*, *supra*, 59 Cal.4th at pp. 266–267.) That seems to have been shown here. But that is not the end of the evidentiary analysis. As the Comment from the Assembly Committee on the Judiciary to Evidence Code section 1401 explains, "Authentication of a writing does not in and of itself authorize the writing to be admitted in evidence. The writing, of course, must be relevant and not made inadmissible by any exclusionary rule—*e.g.*, the hearsay rule, the best evidence rule, or the rule excluding a coerced confession." (Assem. Com. on Judiciary, com. on Assem. Bill No. 333 (1965 Reg. Sess.) reprinted at 29B pt. 5 West's Ann. Evid. Code (2015 ed.) foll. § 1401, p. 203.)

Here, Jefferson effectively limits his argument to the issue of authentication. He fails to contest, except in a few sentences in very conclusory terms, the substantive basis of the trial court's ruling. Our review of the record finds the court's evidentiary rulings are amply supported for the reasons given. But even if there were error, it was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also Evid. Code, § 353.) The exclusion of evidence is a generally question of state law for which the *Watson* standard applies. (*People v. Jones* (2013) 57 Cal.4th 899, 957; *People v. Lucas* (1995) 12 Cal.4th 415, 468.) As the court found in its denial of the new trial motion, "upon the totality of the record, [the minor's] alleged comment to the defendant that she could make his life hell, if counsel had laid the proper foundation for its admission, would not have changed the outcome of the trial." The trial court's conclusion is well supported by the record.

## III

## There Is No Showing of Ineffective Assistance of Counsel in this Direct Appeal

Jefferson claims defense counsel was ineffective for three reasons. He claims counsel should have (a) laid a proper foundation for the introduction of exhibits C and D, (b) let the jury know the minor had use immunity, and (c) confronted the minor with copies of the Instagram text messages. There is also a general claim of ineffective assistance, but without hard specifics it is hard to analyze the claim. These issues were also raised, and rejected, in a new trial motion.

The burden to establish ineffective assistance of counsel rests with the defendant. It must be shown that "counsel's

representation fell below an objective standard of reasonableness under prevailing professional norms, and counsel's deficient performance was prejudicial, that is, there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Sepulveda* (2020) 47 Cal.App.5th 291, 301 [citations omitted].)

However, this ineffective assistance claim is made on the direct appeal. A claims of ineffective assistance of counsel is better raised on habeas corpus because "certain practical constraints make it more difficult to address" ineffective assistance of counsel claims on direct appeal. (*People v. Mickel* (2016) 2 Cal.5th 181, 198.) "The record on appeal may not explain why counsel chose to act as he or she did. Under those circumstances, a reviewing court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel's actions or failure to take certain actions were objectively unreasonable." (*Ibid.*)

Jefferson failed to meet his burden. He does not—and our review of the record suggests he cannot—point to affirmative evidence that defense counsel had no rational tactical purpose for what was done, and not done, relative to the issues raised. For example, it is unclear from the record on appeal why counsel chose not to raise the use immunity issue. But given this uncertainty, we cannot on direct appeal conclude the failure to raise the issue was ineffective assistance. There are many tactical reasons why counsel might not have wanted to bring this up directly. These matters could be fully fleshed out in a habeas corpus proceeding. Finally, we would point out the obvious: Jefferson absconded on the day of closing argument.

## IV

## There Was No *Brady* Violation

In an unrelated 2018 incident, the minor was contacted by police on the street while in the company of a known prostitute. When asked, she twice gave them a false name to avoid arrest on outstanding warrants unrelated to this case. A police report was prepared but not timely turned over to the defense. Jefferson says this was a *Brady* violation. We disagree.

Under *Brady*, "the prosecution has a constitutional duty to disclose to the defense material exculpatory evidence, including potential impeaching evidence. [Citation.] The duty extends to evidence known to others acting on the prosecution's behalf, including the police. [Citation.] A *Brady* violation occurs if three conditions are met: ' " 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or it is impeaching; [the] evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this context, focuses on the materiality of the evidence to the issue of guilt or innocence." ' " (*People v. Harrison* (2017) 16 Cal.App.5th 704, 709; see also *Strickler v. Greene* (1999) 527 U.S. 263.)

The prosecution conceded below that the police report should have been turned over to the defense right away because it contained potential impeachment evidence. However, it did not concede that the police report was held back; and there is little evidence suggesting it was.[6] The prosecution said it did not

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[6] The trial court was dismissive of defense counsel's claim. In its findings denying the new trial motion, it said defense

receive the report until after trial, at which point it promptly forwarded it to defense counsel. However, when the defense claims it did not timely receive a document required to be turned over under *Brady*, the burden of proof is on the prosecution to provide evidence showing what documents were disclosed. Its failure to make such showing here compels the conclusion that the subject police report was not turned over until, as defense counsel insisted, after trial was completed. We also note no argument was made, or evidence presented, that the police report was willfully withheld.

The suppression of evidence favorable to the defense presents a mixed question of fact and law. Thus, we defer to the trial court's determinations of facts that are supported by substantial evidence in the record, and we review the application of the law to the facts de novo. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

Jefferson met the first two elements: The evidence that the minor lied to the police was possible impeachment, and it was suppressed by the State.[7] However, Jefferson did not show the failure to turn over the police report prior to trial was prejudicial under these facts or served to undermine confidence in the verdict. The credibility of a witness can be tested by evidence the witness has lied about something material. The purported lie here—giving a false name to avoid arrest on a warrant—came as part of unrelated contact with the police, and it is highly

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counsel's claim it did not receive the report prior to trial was speculative.

[7] It appears this was a consensual encounter and thus no crime was committed when she gave a false name. (*In re Voeurn O.* (1995) 35 Cal.App.4th 703, 797.)

improbable that such evidence, if it had been allowed, would have had a significant impact on the jury's understanding of the minor's credibility. As the trial court pointed out in denying the new trial motion, the minor was "credible and convincing. It was evident to the Court, and undoubtedly to the jury, that the young woman was testifying reluctantly, and was not motivated by animus towards the defendant."

Relying on *Silva v. Brown* (9th Cir. 2005) 416 F.3d 980, Jefferson argues reversal is compelled because the minor was the only witness and her credibility was crucial. But unlike *Silva*, where the testimony of a potentially unreliable witness was highly material as to how or by whom the deceased was killed, here the lie was immaterial, and completely unrelated, to the charged crimes. (*Id*. at pp. 985–991.) There was no showing of prejudice; the evidence was not objectively material under the facts to the issue of guilt or innocence. We find there was no *Brady* violation requiring per se reversal.

## V

## The Court Did Not Err in Admitting the Prior Pandering Conviction

Jefferson argues the trial court committed reversal error by admitting evidence of an *uncharged* criminal offense under Evidence Code section 1101, subdivision (b). This relates to the testimony of undercover Police Officer Angela Luna that in October 2013, while posing as a prostitute in a sting operation, Jefferson approached her; and, after further contact by telephone and text, he offered to be her pimp.

The first problem with this argument is that Officer Luna was not testifying to an *uncharged* offense. Jefferson was *convicted* of attempted pandering based on his contact with the undercover officer. The second problem is that Jefferson waived any possible error by stipulating to the admission of the conviction.

Some context is necessary. Jefferson objected to the officer's testimony. Following a lengthy colloquy between court and counsel about the applicable law and how the 2014 conviction was similar and dissimilar to the charged offenses, the court gave an indicated ruling. "On the trial matter, I have considered the arguments of counsel concerning the 1101(b) argument. I will issue a written finding of fact and conclusions of law after I hear the actual testimony, but unless the actual testimony is materially different than has been represented, I am finding you can admit it." The court made it clear that it would be admitted solely on the issue of intent.

Officer Luna was called as a witness. During her testimony, she indicated that as a result of his conversation with her, Jefferson was arrested. At this point, the prosecution stated that counsel had a stipulation. Read to the jury, the written stipulation provided that, "The parties hereby stipulate that Devante Jefferson was convicted of attempted pandering by procuring on January 23, 2014, in violation of Penal Code Section 664/266i(a)(1)." The court accepted the stipulation. No objection to the introduction of Luna's testimony was renewed.

An in limine motion to exclude testimony at trial preserves the issue for appellate review only if the following three criteria are met: the specific legal ground for exclusion is stated, the motion is directed at a particular piece of evidence, and the

motion is made at a time when the trial court can determine the evidentiary question in context. (*People v. Morris* (1991) 53 Cal.3d 152, 190.) Here, the trial court clearly stated that it would make a ruling after the evidence was presented; and its admission would depend on whether the actual testimony was as represented. Under these circumstances, Jefferson was required to renew the objection to preserve the issue on appeal. The failure to do so forfeited the issue.

Even if it had been properly preserved, the court did not abuse its discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602 [standard of review is abuse of discretion].) Evidence Code section 1101, subdivision (b) allows admission of evidence of a prior crime when "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ." To be admissible to prove intent, the conduct must be sufficiently similar to support the inference the defendant probably harbored the same intent in each instance. (*People v. Leon* (2015) 61 Cal.4th 569, 598.) Here, Jefferson's prior conduct—attempted pandering—was sufficiently similar to the charged offenses that the conviction was admissible on the issue of intent. Finally, we note that in closing argument, the prosecution made it very clear to the jury that this evidence could only be used to decide whether Jefferson had the intent and not for any other purpose.

## VI

## The Court Properly Refused to Strike the Strike

Before trial, Jefferson moved to strike a 2012 first degree burglary conviction. (*People v. Superior Court (Romero)* (1996) 13

Cal.4th 497, 504; Pen. Code, § 1385.) He argues the trial court did not give adequate consideration to his youth and his abuse of alcohol before denying the motion. We review the court's ruling under the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

The record reflects that in 2012, Jefferson was 19 when he was convicted of first degree burglary, a felony, and was sentenced to 365 days in jail and placed on three years formal probation. In 2014, he was convicted of attempted pandering, a felony, and sentenced to three years in prison. In 2016, he was convicted of driving under the influence of alcohol with a BAC of 0.08 percent, a misdemeanor. When he was arrested in 2017 for the offenses here, he was 24 years old.

We first note that neither issue was raised below. They were not included in the pretrial motion to strike, they were not included as mitigating factors in the probation report, and they were not argued by new counsel at sentencing. Moreover, the cases cited by Jefferson here, *People v. Caballero* (2012) 55 Cal.4th 262 and *People v. Simpson* (1979) 90 Cal.App.3d 919, are inapt. *Caballero* dealt with whether a particularly lengthy sentence to a juvenile offender was cruel and unusual. (*Caballero*, at pp. 266–268.) But here, Jefferson was an adult when the burglary was committed. And while *Simpson* holds that alcoholism may be a circumstance in mitigation (*Simpson*, at pp. 926–928), there was no evidence here that Jefferson was an alcoholic. A misdemeanor conviction for driving under the influence, one or two reported episodes of being drunk, and a trip to a liquor store while he was waiting for Aarin to finish her date, would not support an inference of alcoholism.

In refusing to strike the strike, the trial court relied on the increasing severity of the crimes, the status of the victim here, the fact this crime was similar to the 2014 conviction, and Jefferson's decision to abscond during trial. We find no abuse of discretion.[8]

## *DISPOSITION*

The judgment is affirmed.

SALTER, J.*

We concur:

BIGELOW, P. J.

STRATTON, J.

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[8] It is also argued that the cumulative effect of the errors requires reversal. Having found no error, and given the overwhelming evidence of Jefferson's guilt, we reject that argument.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.